Supreme Court, U. S.
FILED
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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-442

JOHN H. POELKER, Mayor of the City of
St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of Health and Hospitals,
and Acting Commissioner of Hospitals of the
City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, and a Class,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI DOCKETED SEPTEMBER 20, 1975
PETITION GRANTED JULY 6, 1976

IN THE

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JOHN H. POELKER, Mayor of the City of
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APPENDIX

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In the United States District Court
Eastern District of Missouri
Eastern Division

Jane Doe,
Plaintiff,
v.
John H. Poelker, Mayor, et al.,
Defendants.
No. 73-C-565-(A).

DOCKET ENTRIES

1973	Proceedings
Aug. 17	Complaint for declaratory judgment and injunctive relief filed and summons issued.
Sept. 4	Marshal's returns to service of summons/complaint/interrogatories on defts filed (executed 8-20-73 John H. Poelker; 8-28-73 R. Dean Wochner, M.D.)
Sept. 21	Defts' joint answer filed.
Oct. 4	Deft John H. Poelker's answers to plff's interrogs filed.
Oct. 5	Plff's motion for summary judgment, with attached aff. of plff, Jane Doe, and preliminary memorandum of authorities in support of said motion, filed. Oral argument requested.
Oct. 10	Answers to plff's interrogs by deft R. Dean Wochner, M.D., Director of Health and Hospitals, and Acting Hospital Commissioner of the City of St. Louis, Mo, filed.

1974

Feb. 26 Defts' motion to dismiss plff's complaint filed.

Mar. 22 Memo and Order filed. Motion of defts. to dismiss for lack of standing is sustd. Cause dismissed. CC to attys by Ct. Clk.

Mar. 26 Notice of appeal of plff fr Memo & Order of 3-22-74 fld. Copy of appeal sent to attorneys for defendants.

1975

Jan. 13 Memorandum & Order—tld. cause dismissed with prejudice.

Jan. 20 Plff's Notice of Appeal—fld.

Aug. 8 Memo and Order—fld. no attorney's fees allowed to plff.

Order—fld that prohibiting abortions is unconstitutional & that Defts' change their policy on non-therapueutic abortions. Copies sent to attorney's.

Aug. 14 Plff's Notice of Appeal—fld.

GENERAL DOCKET

United States Court of Appeals
for the Eighth Circuit
Eastern District of Missouri

Jane Doe,
Appellant.
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Case No. 74-1232.

Date	Proceedings	Filed
1974		
Apr. 8	Motion of appellees for special orders to preserve appellees' rights to fair hearing, etc. Orig & 5 copies)	7
	Appearance for appellees.	
Apr. 11	Reply of appellant to Motion of appellees for Special Orders, etc.	10
June 4	Opinion by J. Ross (Pr.Pub.)	15

GENERAL DOCKET

United States Court of Appeals
for the Eighth Circuit
Eastern District of Missouri

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri and R. Dean Wochner, M.D., Director of the Dept. of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Case No. 75-1069.

1975	Proceedings	Filed
Apr. 14	Opinion by Judge Ross (printed, published)	12
May 7	Order: (printed, published); petition for rehearing and suggestions for rehearing en banc are denied; pages 11 and 14 are withdrawn and replaced by new pages 11 and 14, attached hereto and by reference made a part hereof	16
June 2	Order: Pages revised by this Court's order of May 7 1975 (12, 13 and 14 of this court's opinion) withdrawn and pages 12 to 20 inclusive, the original of which new pages are attached and by reference made a part hereof. Because of the change in substance of the attorneys' fee portion of the opinion made necessary	

by Alyeska Pipeline, the appellees are given an additional 14 days to file a second petition for rehearing en banc. Such petition shall be limited solely to the changes made in the section of the opinion relating to attorneys' fees, after the ruling on which, the appellee may, if it so desire, renew its request for stay of mandate pending appeal. 24

GENERAL DOCKET

United States Court of Appeals
for the Eighth Circuit
Eastern District of Missouri

Jane Doe, et al.,
Appellants,
vs.
John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Case No. 75-1648.

Date	Proceedings	Filed
1976		
Jan. 5	Per curiam opinion (Printed, Published).	9

In the United States District Court for the Eastern District of Missouri, Eastern Division

Jane Doe,

Plaintiff,

vs.

John H. Poelker, Mayor of the City of St. Louis, Missouri,

and

R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,

Defendants.

Cause No. 73C 565(A)

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed August 17, 1973)

Comes now plaintiff and for her cause of action states:

I. **Jurisdiction**

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; under United States Code, Title 28, Chapter 85, Section 1343; under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; and under United States Code, Title 42, Chapter 21, Section 1983.

2. The defendants are residents of and are to be found within this federal judicial district and division.

3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions.

II. **Parties**

4. Plaintiff, Jane Doe, is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harassment and is available to the Court at its order and convenience.

5. Plaintiff resides with her husband and their two children, both of whom are over seven years of age.

6. Plaintiff's husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. Plaintiff and her husband cannot afford the expense of another child and plaintiff's consequential loss of employment. Plaintiff and her family are in severe, financial straits and plaintiff is the holder of a City of St. Louis hospital clinic card.

7. Since 1965 plaintiff has incurred a minimum of five miscarriages and is presently pregnant and within the first trimester of said pregnancy.

8. During the month of August, 1973, plaintiff on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

9. Said refusals were based upon the stated policy of said hospitals, as expressed by said physicians, the same being a blanket prohibition against performing abortions.

10. Plaintiff suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then return to said hospital for an hysterectomy, involving the permanent removal of plaintiff's uterus, oviducts and ovaries, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

11. The ordinary and routine medical procedure in plaintiff's situation is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to plaintiff.

12. Plaintiff brings this cause of action on her own behalf and on behalf of the entire class consisting of pregnant, women residents of the City of St. Louis, Missouri desiring to utilize the personnel, facilities and services of the general, public hospitals within the City of St. Louis, Missouri, for the medical termination of said pregnancy. Said class of pregnant, women residents is so numerous that joinder of all members is impractical. There exists substantial questions of law and fact common to the class and the claims of plaintiff are typical of the claims of the class. Plaintiff will fairly and adequately represent the interests of the class.

13. Defendant, John H. Poelker, is the duly elected and acting mayor of the City of St. Louis, Missouri, in said capacity is the chief executive officer of the same and as such exercises control and authority, both express and implied, over the Director of Health and Hospitals, the Health Commissioner and the general, public hospitals of said City, all of whom have a role in the existence, application, implementation and enforcement of the said policies, rules, regulations, procedures and practices herein challenged. Said defendant has on numerous past occasions publicly stated that the medical procedure of abortion will not be allowed in said city's general, public hospitals and the force and weight of his office and statements are largely responsible for the existing situation.

14. Defendant, R. Dean Wochner, M.D., is the duly appointed and acting Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri and in said capacities is the principal and chief medical official of the same, having the authority and responsibility of creating, defining, applying, implementing and enforcing all said city's medical policies, rules, regulations, procedures and practices affecting the operation of said city's general, public hospitals, including those herein challenged.

III. Causes of Action

15. Said express and implied policies, rules, regulations, procedures and practices herein challenged:

a. Interfere with and deprive plaintiff and her respective physician of the right to privacy within the patient-physician relationship and infringe upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

b. Interfere with and deprive plaintiff of her right to obtain and receive reasonable, medical services according to the highest standards of medical practice, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

c. Interfere with and deprive plaintiff of the fundamental rights of a woman to determine for herself whether to bear children and to maintain her marital privacy in matters respecting marriage, family, sex and procreation, the same being protected and guaranteed by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

d. Interfere with and deprive plaintiff of the right to receive safe and adequate medical advice and treatment pertaining to the decision of whether to carry a pregnancy to term, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

e. Interfere with and deprive plaintiff of the equal protection of the laws by treating similarly situated classes differently and discriminatorily with no compelling justification for said classification, the same being protected and guaranteed by the Fourteenth Amendment to the United States Constitution; and

f. Interfere with and deprive plaintiff of due process of law by arbitrarily denying her the medical procedure of abortion without justification or cause, thereby subjecting her life and liberties to increased possibility of loss.

V. **Relief Prayed**

Wherefore, plaintiff prays this Court:

16. Issue a declaratory judgment holding that any and all express or implied policies, rules, regulations, procedures and practices, barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri for the performance of abortions are in violation of the constitutional rights of plaintiff and the class of women similarly situated, as protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

17. Issue a permanent injunction restraining defendants, their agents, employees, appointees and successors from applying, implementing and enforcing or threatening to apply, to implement or to enforce said policies, rules, regulations, procedures and practices herein challenged in derogation of the rights of plaintiff and said class, inasmuch as plaintiff and said class have no clear nor adequate remedy at law and the continued acts of defendants, if not restrained, will continue to cause irreparable harm and injury to plaintiff and said class.

18. Issue such other and further orders and relief as to the Court may seem meet and proper and to tax all costs herein to defendants.

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U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

SERVICE OF PROCESS

PLAINTIFF: Jane Doe — COURT NUMBER: 73C 365(A)

DEFENDANT: John H. Poelker and R. Dean Wochner — TYPE OF WRIT: Summons & Interrogs

SERVE / AT

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: R. Dean Wochner, M.D.

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code): City Hospital, Starkloff Memorial, 1515 Lafayette, St. Louis, MO OR 8121 Pershing, St. Louis, MO 63130

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Frank Susman
705 Olive Street
St. Louis, MO 63101

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 1 OF TOTAL 2

CHECK IF APPLICABLE: ☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

FILED SEP 4 1973 U.S. Dist. Clerk E. Dist. Mo. St. Louis

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank Susman — TELEPHONE NUMBER: 621-2030 — DATE: 8/17/73

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted.	DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: B Brunhoeber			DATE: 8-17-73

☑ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above): 1515 Lafayette City Hospital #1

FEE (If applicable): $3.00 — MILEAGE: $.48

DATE(S) OF ENDEAVOR (Use Remarks if necessary): DATE OF SERVICE: 8-28-73 — TIME: 10 AM/PM — SIGNATURE OF U. S. MARSHAL OR DEPUTY: Julia A. Schlueter

REMARKS: 8-27-73 HOME ILL. 2 mi

1

USM 285 (Ed. 7-1-70) — 1. CLERK OF THE COURT

45:3201 45:3361

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

SERVICE OF PROCESS

PLAINTIFF: Jane Doe — COURT NUMBER: 73C 565(A)

DEFENDANT: John H. Poelker and R. Dean Wochner — TYPE OF WRIT: Summons & Interrogs

SERVE / AT

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: John H. Poelker, Mayor

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code): City Hall, 1200 Market Street, St. Louis, MO 63103, OR 4555 Dryden, St. Louis, MO

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Frank Susman
705 Olive Street
St. Louis, MO 63101

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 2 OF TOTAL 2

CHECK IF APPLICABLE: ☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

FILED SEP 4 1973 U.S. Dist. Clerk E. Dist. Mo. St. Louis

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Frank Susman — TELEPHONE NUMBER: 621-2030 — DATE: 8/17/73

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted.	DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: B Brunhoeber			DATE: 8-17-73

☑ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): Karen Kovac Secretary To The Mayor — ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above)

FEE (If applicable): $3.00 — MILEAGE: $

DATE(S) OF ENDEAVOR (Use Remarks if necessary): DATE OF SERVICE: 8-30-73 — TIME: 1 PM — SIGNATURE OF U. S. MARSHAL OR DEPUTY: Robert W. Smith

REMARKS

14

USM-285 (Ed. 7-1-70) — 1. CLERK OF THE COURT

In the United States District Court
Eastern District of Missouri
Eastern Division

(Title Omitted in Printing)

DEFENDANTS' JOINT ANSWER

(Filed September 21, 1973)

Come now the defendants and make their joint Answer, respectfully stating and informing the Court as follows, to wit:

I. **Admissions and Denials**

1. Deny paragraph 1.

2. Admit paragraph 2.

3. Deny paragraph 3.

4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12.

5. Defendants deny paragraph 13; and answer further that defendant Poelker being Mayor of the City of St. Louis is the chief executive officer of such City and has State of Missouri statutory, Charter of St. Louis, and City of St. Louis ordinance, duties, responsibilities, rights, privileges and authority as such laws provide.

6. Defendants admit that defendant R. Dean Wochner, M.D., is the duly appointed and acting Director of Health and Hospitals and is acting Hospital Commissioner of the City of St. Louis, but deny the remainder of the allegations of paragraph 14; and

answer further that defendant Wochner as the occupant of said offices has such duties, responsibilities, rights, privileges and authority as the laws of the State of Missouri, the Charter and ordinances of the City of St. Louis provide for such offices.

7. Deny paragraph 15 and each of its dependent paragraphs a, b, c, d, e, and f.

II. **Further Defenses**

8. The performance of abortions for reasons other than for the physiological grave injury or life of the mother is felonious under the laws of the State of Missouri, and against the public policy of such state: and the validity of such legal status of the laws of the State of Missouri is presently under litigation in the courts of the United States separate and apart from this action.

9. The hospitals of the City of St. Louis were created and exist for the care and treatment of the sick, injured, and those requiring medical services as recognized under the laws of the State of Missouri, the City of St. Louis, and within the public policy of the State and City.

10. Abortion, for reasons other than to save the mother from grave physiological injury or death, is against and contrary to the laws and public policy of the State and City.

11. Abortion, for reasons other than to safeguard the mother from grave physiological bodily injury or death, has never been within those medical services rendered by the hospitals of the City of St. Louis and has been both illegal (as aforesaid) and outside of, contrary to and prohibited by medical policies and judgment of the medical authorities of such hospitals.

12. The City and its inhabitants, acting through duly empowered representatives, has the right to make reasonable determinations as to what medical services shall be supplied in

the public hospitals of such City; and abortion, other than to protect the mother from grave physiological injury or death, is a medical procedure which lawfully can and has been reasonably excluded from such services given by the City's hospitals.

13. The plaintiff, and any of her class, has no legal right to require the City of St. Louis to abort her or their pregnancies under circumstances where there is no grave threat to her physiological safety or life.

14. To require the City of St. Louis to abort the plaintiff, or any members of her class, under circumstances violative of the aforesaid laws, public policy and medical judgment, through the assertion or claim of a United States constitutional right would be a violation of the Ninth and Tenth Amendments of the United States Constitution, and a resulting deprivation of the individual, distributive and collective rights of the people of the State of Missouri and the inhabitants of the City of St. Louis to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

15. The plaintiff, and any members of the purported class, have a clear and adequate remedy at law.

16. The plaintiff, and any members of the purported class, have failed to state a Federal claim for which relief can be granted.

17. Plaintiff, and any members of the purported class are not entitled to injunction to protect against irreparable harm since plaintiff and such class have the present capacity and ability to secure such medical services for abortion at other medical service facilities or institutions which are performing abortions for women under plaintiff's alleged circumstances.

18. The State of Missouri has enacted *"House Committee Substitute for House Bills Nos. 731 and 793,"* a true copy of which is attached hereto and made a part hereof by reference as

Defendant's Exhibit No. 1. Such statute provides that no public hospital of the State of Missouri shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of such public hospital. By force and right conferred by such statute the City of St. Louis in the operation of its public hospitals (including the Max C. Starkloff Memorial Hospital), has determined that abortions other than to save the life of the mother shall not be performed in its hospitals; as a consequence, neither the plaintiff nor any other pregnant woman desiring an abortion for reasons other than to save her life, have any right to have such abortion performed in the City Hospitals of the City of St. Louis.

19. The United States Government, in all its departments and through all its officials, is required, to respect and regard as a rule of decision the positive law of the State of Missouri, namely, "House Committee Substitute For House Bills Nos. 731 and 793;" to accord due process of law to the State of Missouri and the City of St. Louis in deciding any alleged right of plaintiff to coerce the violation of such statute by Federal action in accordance with the Fifth and Fourteenth Amendments to the United States Constitution, and according to the modalities of Title 28, Sections 2281 through 2284, inclusive.

20. The plaintiff is governed by the provisions of "House Committee Substitute For House Bills Nos. 731 and 793," and the State of Missouri has reserved to itself and not delegated to the United States in accordance with the Ninth and Tenth Amendments of the United States Constitution, the right to determine whether abortions shall or shall not be performed in the public hospitals of the City of St. Louis, a municipal corporation and political subdivision of the State of Missouri.

21. The adjudication of the merits of the issues raised in this action cannot be made without the presence as a party the City

of St. Louis, a municipal corporation, the State of Missouri, and the husband of the plaintiff.

22. Principles of Federal-State relations, comity, and Federal abstention militate against resolution of the plaintiff's claims by this Court.

23. Plaintiff has an adequate and sufficient remedy at law.

24. Plaintiff has failed to exhaust adequate and sufficient remedies existent in the State Courts of the State of Missouri.

25. Plaintiff's claims are not properly within the scope or purview of the rights and relief to be afforded under 42 U.S.C. 1983.

26. Neither the Court nor the defendants have any present basis upon which to evaluate the plaintiff's standing as a fit subject of the equitable powers of this Court.

27. Plaintiff is not properly a representative of a class of persons entitled to maintain this action.

28. Plaintiff has not demonstrated or shown irreparable harm or the threat thereof if Federal injunctive relief is denied.

29. All qualified natural persons have an inalienable natural right to participate in the institution of marriage, which no government has any lawful right to deny or substantially interfere with.

30. All natural persons have a natural and inalienable right to the preservation, continuance of and protection of the institution of marriage, and no government has any lawful right to disparage, deny and substantially interfere with.

31. Marriage has an unalterable nature required by its ends and purposes which cannot be substantially changed, altered, denied or interfered with without destroying the institution

itself and the rights of persons of the society and state in which they exist.

32. Marriage is an institution essentially composed of a tripartite relationship of the State, a male as husband and a female as wife; each party assumes essential legal and natural obligations and duties, and is possessed of certain rights and privileges which cannot be abrogated without destroying the relationship, and in consequence the institution.

33. Marriage has as a part of its essential nature a union of a male as husband and a female as wife in spiritual and physical union employing their respective faculties for the begetting and nurture of children in a family, for perfection of the members of the family, the propagation of the human race, the continuance of the family and the state, and for the welfare and mutual protection of the individual members of the state, and the state.

34. The aforesaid institution of marriage in its essential nature antedates the *Common Law of England* and was incorporated into such Common Law from inception as possessed of said Judeo-Christian precepts and characteristics; such institution with its essential nature was a part of the Colonial Law of England in the United States prior to separation, and was later included within the highest positive law of the United States through recognition of inalienable natural rights of persons and institutions by the *Declaration of Independence of the United States*, later adopted Constitution of the United States and all amendments thereto, and in the traditions and fundamental principles of inalienable natural rights of persons, in the United States and each State of the United States at all times including the present.

35. The people of the United States, and the people of the several States of the United States, have by force of the application of the Ninth Amendment and the operation of the Tenth

Amendment to the United States Constitution, reserved to themselves and have not delegated to the United States, its departments or officials the power to substantially alter, change, modify or degrade the institution of marriage, by interfering with or negating one of the essential attributes of such institution as it is recognized, established and obtains under the law, traditions and fundamentals of the several States of the Nation and the positive and common law of the several States, including the State of Missouri.

36. The people of the United States, and particularly the people of the State of Missouri, have a natural right, and a United States Constitutional right, to have the Government of the United States, including its judiciary, protect, conserve and guard the institution of marriage in its essential character aforesaid, and to not disturb, negate and destroy such institution by purporting to grant to a female within such institution a unilateral, unconditional right to decide whether to bear children resulting from such marriage, and to carry out through abortion her negative decision.

37. For the Government of the United States to purport to grant such right to such a female as aforesaid, including plaintiff, is a fundamental violation of the natural rights of the people of the United States and particularly the people of the State of Missouri, and of the Constitution of the United States by asserting powers prohibited by Article IX of the Amendments of said Constitution and not delegated but reserved by the people according to Article X of the Constitution.

38. For the Government of the United States to purport to grant such right to such female as aforesaid, including plaintiff, is a fundamental violation of the distributive and individual natural rights of a male as husband in the marriage relationship and in violation of his individual and distributive rights as a person entitled to the protection of the laws of the State

of Missouri and powers of the people reserved by the Ninth Amendment and non-delegated pursuant to the Tenth Amendment; and such violations deny each such male the guarantee of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

39. For the United States Government to so alter the institution of marriage in its essential nature and character would be a purported amendment of the Constitution of the United States by a method or way unauthorized by said Constitution and particularly Article V thereof, in violation of said Ninth and Tenth Amendments of the United States Constitution and a violation of the distributive individual rights of the people of Missouri, and persons, particularly the husband in each marriage existent of the State of Missouri, to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

Wherefore, defendants having made good and sufficient answer, they pray that the plaintiff's case be dismissed and defendants be allowed to go hence with their costs herein expended.

Respectfully submitted,

JACK L. KOEHR
City Counselor

EUGENE P. FREEMAN
Deputy City Counselor

Attorneys for Defendants
Room 314, City Hall
1200 Market Street
St. Louis, Missouri 63103
453-3366

(Affidavit of service omitted in printing.)

Defendants' Exhibit No. 1

First Regular Session

[Truly Agreed to and Finally Passed]

House Committee Substitute for
HOUSE BILLS NOS. 731 & 793

77th General Assembly

AN ACT

Relating to abortions

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes.

Section 2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.

Section 3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress.

In the United States District Court
Eastern District of Missouri
Eastern Division

(Title omitted in printing)

ANSWERS TO INTERROGATORIES

(Filed October 4, 1973)

Comes now, John H. Poelker, Mayor of the City of St. Louis, Missouri, and makes his answers to written interrogatories served with the Complaint and Summons on August 20, 1973.

Respective of the designations identifying the plaintiff's questions, I answer stating as follows, to wit:

1. City Hospital rules and regulations exemplified by "by-laws;"

a.

i) Max C. Starkloff Hospital; adopted March 1972;

ii) Homer G. Phillips Hospital; adopted April 29, 1968, and revised May 26, 1971.

b.

i) Max C. Starkloff Hospital:

"PART II—RULES AND REGULATIONS

"E. General Rules Regarding Abortions and Sterilizations

"If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

"If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

"A valid permission for a sterilization procedure for a married patient requires the written consent of the spouse when available.

"Whenever the married patient claims dissertion or for reasons of mental incompetency a notarized affidavit will be submitted in lieu of the spouse's written consent.

"In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

"Therapeutic abortion (the removal with legal justification of the human fetus from its mother prior to viability) will be performed only for medical reasons or indications.

"Prior to the performance of a therapeutic abortion, two consultants must agree in writing that the medical indications justify such procedure."

ii) Homer G. Phillips Hospital:

"Article III, Section 4. Committees

"6. The Abortion and Sterilization Committee consists of the Chief of Ob-Gyn, a member of his Department and one additional member of the Medical Staff. It reviews related problems referred by members of the Medical Staff.

It reviews the compliance of the staff with the performance of abortions or sterilizations only as set forth in the rules and regulations."

"Rules and Regulations (p. 10)

"21. Therapeutic abortion, the removal with legal justification of the human fetus from its mother prior to viability, and procedures designed solely to prevent future pregnancies shall be performed only under the following circumstances:

a. Adequate medical reason or justification must be documented.

b. Two consultants, one of whom must be the Chief of the Ob-Gyn Service or his deputy must agree in writing that the medical indications justify such procedure.

c. The consultants must be members of the Medical Staff.

d. Whenever the medical indication for the therapeutic abortion or sterilization involves a specialty other than Ob-Gyn, one additional consultant from that specialty shall be added. All consultants must agree.

e. The request for therapeutic abortion or sterilization procedure must be signed by the patient or her guardian if she is a minor and by her spouse if he is available and be notarized.

"These provisions do not apply when sterilization is an incidental result of the surgical treatment of a serious disease."

2. None. (I am relying upon a statement made personally to me on September 21, 1973, by Dr. R. Dean Wochner, Director

of Health and Hospitals, and Acting Commissioner of Hospitals, of the City of St. Louis.)

3. a) It is my understanding that the laws of the State of Missouri prohibiting abortions other than to save the life of the mother, are incorporated in and reflected by like rules, regulations and requirements of all of the State of Missouri medical licensing boards for physicians and hospitals, and these would prohibit the City's medical personnel from legally and ethically performing abortions contrary to such laws and regulations in the City's hospitals.

b) Pregnancy not being considered an illness, for the City to commit any significant part of its medical resources to terminations of pregnancies through abortion, would work to cause a consequent reduction of care, treatment and services to other persons suffering from illnesses due to such allocation of the limited medical resources of personnel facilities, medicines, etc., available.

c) The City annually assesses a broad range of sociological (including medical) needs of its inhabitants, and within its financial capabilities and allocates for the relief of such needs, municipal funds through budget appropriations; the current allocation of municipal funds for the City's hospitals do not include any recognition of any requirement to provide non-therapeutic abortions, since such abortions have never before been considered a legal or an ethical medical procedure which ought to be provided for by expenditure of public funds; to employ the resources of various kinds required to the performance of such abortions would be a diversion and misuse in violation of the appropriations for the City's hospitals.

d) Performance of any significant number of non-therapeutic abortions at the present time when there has been no provision for the accommodation of the hospital staff, facilities or resources to such use, and there exists no arrangements for the accommo-

dation of the other usual and continuing functions of the hospital to such a change, would be disruptive and would cause an adverse interference with the normal medical operations of the City's hospitals.

4. Yes.

a) On May 21, 1973, at my office in City Hall, Mr. Philip Sutin, a reporter of the Post-Dispatch newspaper, asked me what action the City might take in reference to abortions as a result of a United States Court decision which occurred on May 18, 1973, holding that the State of Missouri laws on abortion were unconstitutional. As best I can recall, my response was in substance that it was my intention to maintain the policy at City hospitals which excludes the performance of abortions for other than therapeutic purposes. This statement was reported on in the Post-Dispacth, commencing that day (5-21-73) and repeatedly thereafter. Further, thereafter, in the course of meetings with representatives of the various news media and other persons having some interest in the subject, I have many times and at various places, repeated the substance of my aforesaid answer to Mr. Sutin. I have made the same substantive statement (as later herein recounted) to Dr. R. Dean Wochner, Director of Health and Hospitals (and Acting Hospital Commissioner), and the City Counselor, Honorable Jack L. Koehr, in the course of my discussions of the question of the performance of abortions in the City hospitals, with these City officials.

I cannot recall, and have no means to establish, the exact dates, wording, times and places, identities and addresses of persons, and to whom, when I repeated the above statement to others (except as noted). But to answer as fully as possible, I attach the following exhibits, namely:

Exhibit 1; a true copy of a letter sent by me to a Mr. Thomas A. Watters of 4494 Lindell Boulevard, St. Louis, Missouri;

Exhibit 2; a news release of my office dated Thursday, May 24, 1973;

Exhibit 3; a news release of my office dated Thursday, July 26, 1973;

Exhibit 4; a true copy of a letter I sent by me to a Mrs. B. Albrecht of 5231 Bancroft Avenue, St. Louis, Missouri, dated August 28, 1973;

Exhibit 5; a true copy of a letter by me to a Mrs. Penelope Fiedler of 10647 Mentz Hill Acres, St. Louis, Missouri 63128, dated September 4, 1973.

These exhibits give a truthful representative idea of my utterances. The letters to private persons are representative of such correspondence with a number of persons varying between one hundred (100) and one hundred and fifty (150) who wrote to me on the subject expressing agreement or disagreement with my statement. Further, tape recordings were made of my news conferences with representatives of the media; however, these are kept for only a week (not transcribed) and routinely erased, and therefore are not available at this time after erasure.

Before I became Mayor, I have no direct recollection of commenting on the question of abortions in City hospitals; however, I am sure that if I was asked I declared my personal opposition to performing abortions (i.e., non-therapeutic).

5. Yes.

6. **On May 19, 1973,** at an hour unknown, by telephone I called Doctor Wochner from my office in City Hall to him at his office (1625 South 14th Street, St. Louis, Mo.). The occasion for the phone call was the fact that the day before (as reported by the news media) a United States Court in Kansas City had ruled that the State of Missouri laws prohibiting non-therapeutic abortions were unconstitutional and there were contemporaneous news media accounts of statements of the At-

torney General of Missouri and Doctor Wochner, as Director of Health and Hospitals of the City of St. Louis, about the effect of the Court's rulings on the respective areas of interest. I understood Doctor Wochner's remarks in the media to mean that he was going to commence the offering of non-therapeutic abortion services in the City's hospitals. The statements of the Attorney General were to the effect that an appeal would be made from the Court's ruling and therefore the case was not final and binding in Missouri. I discussed the situation with Doctor Wochner and made clear to him my opposition to changing the policy and regulations prohibiting non-therapeutic abortions in the City's Hospitals. At the time we agreed to meet on the subject at my office on May 24, 1973, and to have Mr. Koehr, the City Counselor, present for clarification of the legal status of the law relating to abortions in the City's hospitals.

On May 24, 1973, a meeting was held in my office (exact hour unknown) between Doctor Wochner, Mr. Koehr, and me, as previously arranged. At this meeting the City Counselor explained initial consideration showed that the legal situation regarding the rights of the City to prohibit or the duty to make available non-therapeutic abortions in its hospitals was unsettled or not fixed. I instructed the City Counselor to continue his research and consideration of the question. I instructed Doctor Wochner to make no change in the City's position regarding non-therapeutic abortions, but to consult with his medical staff to develop and report to me his recommendations for suggested changes which would be occasioned if the United States Supreme Court and the Federal Court in Kansas City decisions are determined to require the performance of such abortions in the City's hospitals. A news release was made, exemplified by *Exhibit 2*, above.

On July 18, 1973, I convened another meeting in my office (exact hour unknown) betwen Doctor Wochner and Mr. Koehr. The principal reason for the meeting was to discuss the merits

of two Aldermanic Board Bills which had been passed and sent to me for approval. These Broad Bills were No. 58 and 59, respectively, relating to licensing abortion clinics, and regulating abortions performed in the City. I considered Doctor Wochner's views and recommendations, and Mr. Koehr's legal opinion resulting from his office's research and consideration of legal authorities; also, incidental to the exchange between us at the meeting, I again reiterated my previous opposition to the performance of non-therapeutic abortions at the City's hospitals unless required by law.

Acting upon the advice of my medical and legal officers, I approved Board Bill No. 58, and disapproved Board Bill No. 59, on July 26. A news release, stating my reasons was on such date made, and is exemplified by *Exhibit 3*, above.

These are three instances in which I gave any instructions on the question of the performance of non-therapeutic abortions in the City's hospitals. Doctor Wochner is the only person I have given such instructions. Any other statements made by me in this regard, if made, are at this time unknown and would have been of a most casual nature and would have been consistent with the context and instructions explicitly set out foregoing for the three (3) instances; no orders or instructions were given to others.

Other than as recorded in the exhibits attached, I cannot accurately recount the exact wording of my remarks or statements.

The identity and location of the persons involved (i.e., Ques. "c.") are set out above.

/s/ JOHN H. POELKER

State of Missouri }
City of St. Louis } ss.

Before me, on this 4th day of October, 1973, John H. Poelker, of lawful age, being first duly sworn, upon his oath, did say that he is the Mayor of the City of St. Louis, Missouri, and a defendant in the above-styled case to which the foregoing instrument relates, and he did further state that his answers in such instrument are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me, this 4th day of October, 1973.

EDGAR L. ESKER
Notary Public

(Seal)

My Commission expires: 11-19-75.

Exhibit No. 1

May 23, 1973

Mr. Thomas A. Watters
4494 Lindell Boulevard
St. Louis, Missouri 63108

Dear Mr. Watters:

Thank you for taking the time to express your concern with respect to the stand I have taken against abortions.

The recent Supreme Court ruling was not a mandate which forces all health institutions to make abortion services available. Rather, it was a ruling which gives health centers a choice to make such a service available or not as is seen fit.

My decision not to allow abortions to be performed in our two city hospitals is firstly a moral concern which not only reflects my own belief that it is wrong to take the life of another human being, but also the belief of the vast majority of the citizens of Saint Louis. This decision against abortions also reflects the practical reasoning that the tax dollars of our citizens could be better spent for programs that will improve our city rather than destroy life.

I am sorry that you are not in agreement with the stand taken by the City of Saint Louis, but I would hope that you can understand the reasoning which prompted this decision.

Kind regards.

Sincerely,

Mayor

jv

Exhibit No. 2

From Mayor John H. Poelker
Room 200 City Hall
453-3201

FOR IMMEDIATE RELEASE: Thursday, May 24, 1973

As a result of my conferences today with Dr. R. Dean Wochner, Director of Health & Hospitals, and Mr. Jack L. Koehr, City Counselor, we have arrived at the following two conclusions:

(1) I have asked the City Counselor to research legal decisions in other states which touch on the question of public responsibility to provide abortions along with other medical services.

(2) I have asked Dr. Wochner to develop, in consultation with his medical staff, a report on what changes would be recommended in the medical staff by-laws in view of the court decisions affecting Missouri's anti-abortion laws. Dr. Wochner, who would have to approve such changes in the medical staff by-laws, will consult with me before any such by-law changes are adopted.

Exhibit No. 3

From Mayor John H. Poelker
Room 200 City Hall
453-3201

FOR IMMEDIATE RELEASE: Thursday, July 26, 1973

Mayor John H. Poelker today announced that he would continue to oppose abortions in municipal hospitals, but at the same time signed into a law a measure setting up standards for privately operated abortion clinics and hospitals.

The Mayor approved a recently passed aldermanic bill (Board Bill 58) which requires private clinics and hospitals to obtain Board of Public Service permits to assure proper sanitary and professional standards for institutions performing abortion services. This action was taken on the recommendation of Dr. R. Dean Wochner, Director of Health and Hospitals.

Also acting upon the recommendation of Dr. Wochner, Mayor Poelker disapproved a second proposal (Board Bill 59) which sought to further regulate clinics and hospitals providing abortion services.

Dr. Wochner in his recommendation for a veto on the second measure said that he agreed with certain provisions of the bill

such as pre-counseling before an abortion and quarterly reports to the Health Commissioner, but he disagreed with the provision of the proposal which permitted abortions to be conducted in clinics up to 17 weeks. Dr. Wochner in a letter to Mayor Poelker said, "It is my opinion that if any procedures are performed after the first trimester (or approximately 12 weeks) they should be performed in a hospital and not in an out-patient facility."

Dr. Wochner also informed the Mayor in his veto recommendation that some of the detailed list of requirements for specific equipment and supplies goes "far beyond what is medically appropriate and comes close to constituting prohibition through regulation."

Mayor Poelker said he had reached the decision to continue to oppose abortions in municipally financed hospitals because: (1) the City Counselor's Office had been unable to find any specific applicable court case which required a public institution to provide abortion services; and (2) because the State Legislature approved, and Governor Bond has signed, a measure which states, "No physician or surgeon, registered nurse, practical nurse, mid-wife or a *hospital, public* or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral ethics or religious beliefs of such physician, surgeon, registered nurse, practical nurse, midwife or hospital."

The Mayor said, "Although I have previously, publicly and clearly stated that I am personally opposed to abortion, I believe I have acted responsibly on the basis of the law and the public need. I believe it to be unwise public policy to provide abortion services in our institutions when we are frankly not adequately meeting all the medical requirements of our community in our hospitals because of budget limitations."

Mayor Poelker said that abortions would continue to be performed in city hospital institutions at the physician's discretion when such action was necessary to save the life of the mother.

The Mayor's announcement, in effect, prohibits most abortions in the city's public institutions while on the other hand approves certain medical health and professional standards for private institutions and clinics which may wish to provide such services under the terms of a recently rendered court decision.

Exhibit No. 4

August 28, 1973

Mrs. B. Albrecht
5231 Bancroft Avenue
St. Louis, Missouri

Dear Mrs. Albrecht:

Thank you for your letter. The real issue before the courts would appear to be whether or not we are required by law to use tax dollars to perform abortion service.

It is my opinion that abortion is not only morally wrong, but that the tax dollars of our citizens could be better used for programs that will enhance and improve our city rather than to destroy life.

Again, I very much appreciate your letter of support. You have given me added encouragement to continue in my strong stand against abortion.

Kind regards.

Sincerely

MAYOR

jv

Exhibit No. 5

September 4, 1973

Mrs. Penelope Fiedler
10647 Mentz Hill Acres
Saint Louis, Missouri 63128

Dear Mrs. Fiedler:

Thank you for your very kind words in support of my stand against abortion.

My decision not to allow abortions to be performed in our two city hospitals is a moral concern which reflects not only my own strong belief that it is wrong to take the life of another human being, but the belief of the vast majority of the citizens of Saint Louis as well.

This decision against abortions also reflects the practical reasoning that the tax dollars of our citizens could be better spent for programs that will enhance and improve our city rather than to destroy life.

Again, thank you for your support in this controversial issue. You have given me added encouragement to continue in this strong stand against abortion.

Kind regards.

Sincerely

MAYOR

REM/als

United States District Court
Eastern District of Missouri
Eastern Division

(Title omitted in printing)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed October 5, 1973)

Come now plaintiff, Jane Doe, and pursuant to Rule 56 of the Federal Rules of Civil Procedure moves for summary judgment against defendants as prayed in her Complaint, inasmuch as the pleadings heretofore filed and the Affidavit marked "Exhibit A" and attached hereto, show that there are no genuine issues as to any material facts and that plaintiff is entitled to judgment as a matter of law.

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
Attorneys for Plaintiff
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

(Affidavit of service omitted in printing)

Exhibit "A"

AFFIDAVIT OF PLAINTIFF, JANE DOE

Comes now Affiant, Jane Doe, and states that she submits this Affidavit in support of "Plaintiff's Motion for Summary

Judgment" to which it is attached as "Exhibit A" and made a part thereof. Said Affiant further states:

1. She is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harassment and is available to the Court at its order and convenience.

2. She resides with her husband and their two children, both of whom are over seven years of age and under sixteen years of age.

3. Her husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. She and her husband cannot afford the expense of another child and plaintiff's consequential loss of employment. She and her family are in severe financial straits and she is the holder of a City of St. Louis hospital clinic card.

4. Since 1965 she has incurred a minimum of five miscarriages and at the time of filing this cause was pregnant and within the first trimester of said pregnancy.

5. During the month of August, 1973, she on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

6. Said refusals were based upon the stated and admitted policy of said hospitals, as expressed by said physicians; the same being a blanket prohibition against performing abortions.

7. She suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then to return to said hospital for an hysterectomy, involving the permanent removal of her uterus, oviducts and ovaries, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

8. She has been advised by a private physician that the ordinary and routine medical procedure in her situation is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to her.

9. The present and real threat by defendants to implement and to enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

/s Jane Doe

City of St. Louis }
State of Missouri } ss.

On this 4th day of October, 1973, personally appeared before me, an adult female, who being first duly sworn upon her oath did state that she is the plaintiff in the above encaptioned cause, that the above and foregoing Affidavit and the statements contained therein are true to the best of her knowledge, information and belief and that she executed the same as her free act and deed and in the pseudonym of "Jane Doe."

Subscribed and sworn to before me on the day and year last above written.

Burton W. Newman
Notary Public

My Commission Expires: June 26, 1976.

(Seal)

In the United States District Court for the Eastern District of Missouri, Eastern Division

(Title omitted in printing)

PRELIMINARY MEMORANDUM OF AUTHORITIES
Submitted on Behalf of Plaintiff in Support of Her Motion for Summary Judgment

(Filed October 5, 1973)

In recent years, numerous suits have been filed seeking to compel both public and private hospital institutions to allow and to offer the medical procedures of sterilization and abortion, although the medical institution had adopted policies refusing to provide the same. The factual and legal context of the sterilization cases is totally analogous to those involving abortion.

Cases requiring hospitals to provide sterilizations include *Chrisman v. Sisters of St. Joseph* (Civil No. 70-430 [D.Ore. July 22, 1972]); *Taylor v. St. Vincents Hospital* (Civil No. 1090 [D.Mont. Oct. 27, 1972]); *McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2nd Cir. 1971), and *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973). As so aptly noted in *Hathaway, supra*, at page 706,

> "The state interests, recognized by *Roe* as legitimate, are far less compelling in this context. Whatever interest the state might assert in preserving the possibility of future fetuses cannot rival its interest in preserving an actual fetus, which was found sufficiently compelling to outweigh the woman's interest only at the point of viability. The state maintains of course a significant interest in protecting the health and life of the mother who, as here, cares for others whom the state might otherwise be compelled to provide for. Yet whatever health regulations might be appropriate to vindicate that interest, and on the present record we need not decide the issue, it is clear under Roe and Doe (410 U.S. 113 [1973] and 410 U.S. 179 [1973]) that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed." (Parentheses supplied).
>
> . . .
>
> "In so holding, we are not mandating the city or state to maintain this hospital, or to retain its present size, staff or facilities. The hospital is not required to perform all kinds of non-therapeutic or even all therapeutic surgical procedures. We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments, that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."

Similarly, in cases directly on point requiring public hospitals to offer abortions the federal courts have had little difficulty in requiring the same. *Doe v. General Hospital of District of Columbia*, 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.

2d 423 (D.C.C. 1970), and 434 F.2d 427 (D.C.C. 1970), and *Nyberg v. The City of Virginia*, — F.Supp. — (D.Minn. Aug. 9, 1973). In *Nyberg, supra*, Judge Neville succinctly ordered,

> "Resolution No. 2606 (prohibiting abortions in the city's public hospital) takes no consideration of the separate trimesters of the pregnancy period and is devoid of any apparent awareness of the varying degrees to which public interests may be imposed upon a pregnant woman in opposition to her private interests. There can be no other conclusion but that Resolution No. 2606 flies directly in the face of the holdings in *Roe v. Wade* and *Doe v. Bolton, supra*, and it therefore must be declared null and void.
>
> The administrators of the hospital will not be ordered to set up procedures to provide abortion services solely upon the demand of a pregnant woman without an accompanying doctor's request. That situation is not contemplated in either *Wade* 410 U.S. at 153 or *Bolton* 410 U.S. at 189. Neither will the court impose its lay opinion upon the hospital administrators by setting out specific and detailed procedures by which abortion services will be provided. Rather, medical techniques are best left to those who are professionally trained. However, the court does not merely strike down Resolution No. 2606, but requires the hospital administrators to take positive steps within a period of 30 days from date hereof to provide abortion services and facilities to licensed physicians in keeping with the rule quoted above.
>
> The court does not purport to require individuals to participate in the providing of abortion services in contravention of their religious or moral convictions. The relief granted goes only so far as to require that facilities at this public institution be provided for abortion services for those doctors and their women patients who have a right to them and request them." (Parentheses supplied).

The present issue is ripe for summary judgment, inasmuch as plaintiff has alleged the unconstitutionality of a policy by defendants, admitted by them in paragraphs 10, 11 and 12 of their "Joint Answer".

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
Attorneys for Plaintiff
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

(Affidavit of service omitted in printing)

In the United States District Court
Eastern District of Missouri
Eastern Division

(Title omitted in printing)

ANSWERS TO INTERROGATORIES

(Filed October 10, 1973)

Comes now, R. Dean Wochner, M.D., Director of Department of Health and Hospitals, and Acting Hospital Commissioner, of the City of St. Louis, Missouri, and makes his answers to written interrogatories served with the Complaint and Summons on August 28, 1973.

Respective of the designations identifying the plaintiff's questions, I answer stating as follows, to wit:

1. City Hospital rules and regulations exemplified by "by-laws;"

a)

i) Max C. Starkloff Hospital; adopted March 1972;

ii) Homer G. Phillips Hospital; adopted April 29, 1968, and revised May 26, 1971.

b)

i) Max C. Starkloff Hospital:

"Part II—Rules and Regulations

"E. General Rules Regarding Abortions and Sterilizations

"If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

"If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

"A valid permission for sterilization procedure for a married patient requires the written consent of the spouse when available.

"Whenever the married patient claims dissertion or for reasons of mental incompetency a notarized affidavit will be submitted in lieu of the spouse's written consent.

"In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

"Therapeutic abortion (the removal with legal justification of the human fetus from its mother prior to viability) will be performed only for medical reasons or indications.

"Prior to the performance of a therapeutic abortion, two consultants must agree in writing that the medical indications justify such procedure."

c) The legal authority adopting such hospital rules is the Hospital Commissioner in office at the time of adoption. The rule or rules are usually developed by the medical staff of the respective hospital and submitted to the Hospital Commissioner for his consideration. Herbert R. Domke, M.D., was Acting Hospital Commissioner from August 24, 1966, to January 9, 1971; and R. Dean Wochner, M.D., was appointed Acting Hospital Commissioner on January 10, 1971, and has held such office to the present. The foregoing set out rules are referable to the times these Hospital Commissioners (Acting) held office.

d) Each person of the whole medical staff is obligated to obey such rules; specification of each person would involve the names and addresses of a great number of persons. (Same will be supplied if desired.)

2. None.

3. The technical competence and supporting facilities to perform the medical procedure of abortion exist at both of the City's general hospitals. However, the determination of whether the hospitals ought to or could perform abortions for the general public would depend upon a multiplicity of medical administrative factors, some known and others unknown, such as: the number to be performed: the period in the pregnancy term the operations would be performed; the complicating other physical ailments of the patients; the medical complications resulting from the abortion itself; the extent of the redeployment of the personnel and facilities for performance of abortions and the resulting effect on other services; the additional budgetary factors; and provision for and application of psychiatry services would have to be accommodated.

4. Yes.

5. a) Mayor A. J. Cervantes; Mayor John H. Poelker; each at the time was Mayor of the City of St. Louis and had the address of that office. Mayor Poelker presently occupies such office.

b)

i) Mayor Cervantes

On February 23, 1973, the news media gave very prominent treatment to certain comments of mine regarding the relation of the United States Supreme Court decisions relating to abortion. On February 24, 1973, I received a letter from Mayor Cervantes. A true copy of such letter is hereto attached as a part of this document, identified as Exhibit 1, and is intended as part of my answer to this question.

ii) Mayor Poelker

On May 19, 1973, Mayor Poelker, understanding from news media reports of the day prior that I was about to institute performance of non-therapeutic abortions in the City's hospitals, called me on the telephone at my office and made clear to me that non-therapeutic abortions were not to be performed in the City's hospitals. I cannot recall the Mayor's exact words but they occurred within the context of the legal implications of a decision of the United States District Court in Kansas City the day before.

On May 24, 1973, I attended a meeting with the Mayor at his office between us and the City Counselor, Honorable Jack L. Koehr. This meeting was called to clarify the legal situation regarding abortions in Missouri and the City's legal rights and obligations regarding the same in its hospitals. During the course

of the discussions the Mayor again made clear through words I cannot now recall that I was not to offer non-therapeutic abortions in the City's hospitals.

On July 18, 1973, the Mayor again convened a meeting in his office between we three participants of the May 24, 1973, meeting. The specific occasion for the meeting was to consider and advise the Mayor regarding two Board of Aldermen bills relating to abortions. The Mayor was considering the merits of approval or disapproval of these bills. During the course of our discussions the Mayor again reiterated his opposition to the performance of non-therapeutic abortions in the City's hospitals.

c) The times and place of the Mayors' orders or directives to me is included in my answers to subparagraph "b)" of this question "5."

6. Yes.

7. a) I have repeatedly related the sense of the two Mayors' remarks to me to the medical professional and administrative officers of the City's hospitals and laboratories. This would occur when we were assembled at meetings of the "medical cabinet" composed of the persons occupying the offices hereafter detailed in *Exhibit No. 2*. One specific occasion was on July 30, 1973, when I wrote a letter to Dr. L. V. Mulligan, Medical Director of City Hospital (i.e., Max C. Starkloff Hospital). The full text of the letter and the subject matter is best gathered from a true copy of my letter and its attachment set out as *Exhibit No. 3* of these answers.

b) I cannot recall the exact wording of my statements; however, my answer to question "7, a)" above gives the fair and truthful sense of each of my statements to all of my subordinates

on any occasion when I discussed the subject with them. The context is likewise fairly disclosed by such answer.

c) See Exhibit No. 2.

d) The Mayors as set out foregoing and no other person.

/s/ R. Dean Wochner, M.D.

State of Missouri }
City of St. Louis } ss.

Before me, on this 10th day of October, 1973, R. Dean Wochner, M.D., of lawful age, being first duly sworn, upon his oath, did say that he is the Director of Department of Health and Hospitals, and Acting Hospital Commissioner, of the City of St. Louis, Missouri, and a defendant in the above-styled case to which the foregoing instrument relates, and he did further state that his answers in such instrument are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me, this 10th day of October, 1973.

John J. Fitz Gibbon
Notary Public

My Commission Expires July 10, 1974.

Exhibit No. 1

Office of the Mayor/City of Saint Louis, Missouri
Alfonso J. Cervantes, Mayor

February 24, 1973

R. Dean Wochner, M.D.
Director of Health and Hospitals
1625 South 14th Street
Saint Louis, Missouri 63104

Dear Dr. Wochner:

I am hereby issuing to you as the Director of Health and Hospitals in the City of Saint Louis, an Executive Order to suspend all plans to provide Abortion Services, as described in your announcement of yesterday.

Until such time that it is determined by our Law Department, in consultation with the U.S. District Attorney's Office, the precise effect of the United States Supreme Court ruling on the operations of public hospitals, we will not provide new services for abortions in our hospitals.

I would ask that you contact the law Department Monday, and provide them with information that you might have that would assist them.

Sincerely

/s/ A. J. Cervantes
Mayor

Exhibit No. 2

City of Saint Louis
Department of Health and Hospitals
Office of the Director
1625 South 14th Street ● St. Louis, Missouri 63104

John H. Poelker
Mayor

R. Dean Wochner, M.D.
Director

Departmental Cabinet:

Dr. Louis Alvarez —Snodgrass Laboratory
1606 Grattan Avenue

Dr. Helen Bruce —Room 3, Municipal Courts Bldg.

Dr. Bernard Friedman —Koch Hospital
Koch, Missouri

Dr. Valgard Jonsson —Room 3
Municipal Courts Bldg.

Dr. Virginia Larsen —Chronic Hospital
5700 Arsenal Street

Dr. Manuel Menendez —Homer G. Phillips Laboratory
2601 North Whittier

Dr. Eugene Mitchell —Homer G. Phillips Hospital
2601 North Whittier

Dr. Leo Mulligan —Home: 665 South Skinker Blvd.
St. Louis, Mo. 63105

Mr. John Noble —Homer G. Phillips Hospital
2601 North Whittier

Mr. John O'Shaughnessy—Chronic Hospital
5700 Arsenal Street

Mr. Lambert Padberg —Hospital Commissioner's Office
1625 South Fourteenth Street

Mr. Thomas Purcell —Koch Hospital—Koch, Missouri

Mr. James Sullivan —St. Louis City Hospital
1515 Lafayette Avenue

Exhibit No. 3

July 30 1973

Memo to: Dr. L. V. Mulligan
Medical Director
City Hospital

From: R. Dean Wochner,M. D.
Director of Health and Hospitals

Re: Approval of Staff By-Laws

This is to indicate my approval of the changes in the by-laws of the St. Louis City Hospital Medical Staff which were adopted on June 25, 1973. These changes consisted of deletion of reference to abortions in the previous set of by-laws rules and regulations, in keeping with recent court decisions.

As you know, however, Mayor Poelker has directed that he does not want abortions to be performed in the public hospitals "except when it is deemed necessary to save the life of the mother". I am continuing to discuss this matter with the Mayor in an effort to define a limited set of expanded circumstances under which abortions might be performed I am particularly concerned about the situations in which the mother's health is threatened by the pregnancy, but in which the physician cannot

be certain that life itself is in jeopardy. I shall keep you informed of any further developments.

RDW:gp

cc—Dr. Gaetano Bazzano, President
Medical Staff

Enclosure—Approved Minutes of 6/25 meeting

D. *General Rules Regarding Surgical Care* (Cont.)

1. Except in severe emergencies, the preoperative diagnosis and required laboratory tests must be recorded on the patient's medical record prior to any surgical procedure. If not recorded, the operation shall be cancelled. In any emergency the practitioner shall make at least a comprehensive note regarding the patient's condition prior to induction of anesthesia and start of surgery.

2. A patient admitted for dental or podiatric care is a dual responsibility of the dentist or podiatrist and a physician member of the medical staff.

3. Written, signed, informed, surgical consent shall be obtained prior to the operative procedure except in those situations wherein the patient's life is in jeopardy and suitable signatures cannot be obtained due to the condition of the patient. In emergencies involving a minor or unconscious patient in which consent for surgery cannot be immediately obtained from parents, guardian or next of kin, these circumstances should be fully explained on the patient's medical record. A consultation in such instances may be desirable before the emergency operative procedure is undertaken if time permits.

4. The anesthetist shall maintain a complete anesthesia record to include evidence of pre-anesthetic evaluation and post-anesthetic follow-up of the patient's condition.

5. In any surgical procedure with unusual hazard to life there must be a qualified physician present and scrubbed.

6. All specimens removed at the operation shall be sent to the hospital pathologist who shall make such examination as he may consider necessary to arrive at a tissue diagnosis. His authenticated report shall be made a part of the patient's medical record.

E. *General Rules Regarding Abortions and Sterilizations*

If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

A valid permission for a sterilization procedure for a married patient requires the written consent of the spouse when available.

Whenever the married patient claims dissertion or for reasons of mental incompetency a notorized affidavit will be submitted in lieu of the spouse's written consent.

In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

Memorandum and Order of District Court filed January 13, 1975, is printed in the petition for certiorari at pp. A-19-A-26.

Memorandum and order of District Court allowing no attorney's fees filed August 8, 1975, is printed in the petition for certiorari at pages A-56-A-59.

Order filed August 8, 1975, that prohibiting abortions is unconstitutional, etc., is printed in the petition for certiorari at page A-55.

In the United States Court of Appeals
for the Eighth Circuit

Jane Doe, Appellant-Plaintiff, vs. John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri, Appellees-Defendants.	No. 74-1232

I. Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law

(Filed April 8, 1974)

Come now Appellees and respectfully move this Honorable Court for special orders pursuant to Rule 2, of Appellate Procedure, or otherwise through the power of the Court, efficient to

protect Appellees' rights against having matters and things decided upon appeal against them upon a record of the District Court in a state of incompletion as to some matters foreign to the basis for judgment of the District Court due to the Appellees' legal and actual inability to learn of the truth of such matters and contest them because of the acts of the Appellant and the manner of disposition by the District Court. As grounds for such orders the Court is respectfully advised of the following, to wit:

1. The *Complaint* in this case, filed on August 17, 1973, failed to disclose the identity of the plaintiff (here Appellant) or any other significant allegation of fact or circumstance from which Defendants (e.g., here Appellees) could make discovery as to the claims made by Plaintiff. Such failure was alleged by Plaintiff's attorneys to be deliberate and intentional at paragraph 4, page 2 of the *Complaint*. (Copy of *Complaint* attached hereto as: *Appellees' Motion I, Exhibit No. 1.*)

2. On August 22, 1973, *unknown* to the Appellees (or the District Court), Appellant was aborted (per admission).

3. Appellees, on September 21, 1973, did state and inform the District Court, by motion and suggestions, of Defendants inability to learn any material fact or matters about the Plaintiff or the circumstances alleged in the *Complaint*, and as a result thereof were precluded from making informed pleading response, preparation for trial, or to defend themselves upon trial, or thereafter. (Copy of *Defendants' Joint Motion for Order Disclosing Identity of Plaintiff and Submission to Discovery*, attached hereto as: *Appellees' Motion I, Exhibit No. 2, A;* and copy of *Suggestions in Support of Defendants' Joint Motion for Order Disclosing Identity of Plaintiff and Submission to Discovery*, attached hereto as *Appellees' Motion I, Exhibit No. 2, B.*)

4. On September 21, 1973, Appellees did state and advise the District Court by motion and suggestions of the absence of

necessary and indispensable parties required to defend certain positive and common law of the State of Missouri in opposition to the claims of the *Complaint*, which were to be, and were, set up in the contemporaneously filed *Defendants' Joint Answer*. (Copy of *Defendants' Joint Motion for Order on Plaintiff to Join Necessary and Indispensable Parties*, attached hereto as: *Appellees' Motion I Exhibit No. 3, A;* and copy of *Memorandum in Support of Defendants' Motion to Order Joinder*, attached hereto as: *Appellees' Motion I, Exhibit No. 3, B.*)

5. On September 21, 1973, Appellees did make and file in the District Court their *Defendants' Joint Answer*, making such admissions and denials as their, plaintiff caused, limited knowledge permitted, and did further set up said defenses based upon existent Missouri law. (Copy of *Defendants' Joint Answer* attached hereto as: *Appellees' Motion I, Exhibit No. 4.*)

6. On October 5, 1973, Appellant did file a motion for summary judgment claiming that "no genuine issues as to any material facts" existed and attached an *affidavit* of Appellant in support essentially reciting the matters, without particularizing detail, claimed in the *Complaint* and without traversing any defenses of the *Answer*, and swearing to the following:

> 9. The present and real threat by defendants to implement and enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

The jurat to the foregoing affidavit (including paragraph 9 quoted) was affixed on October 4, 1973, attesting to the fact that the Appellant (i.e., "Plaintiff") swore to the truth of the stated matters as of such date. (Copy of *Plaintiff's Motion for Summary Judgment* attached hereto as: *Appellees' Motion I, Exhibit 5, A*; and copy of *Affidavit of Plaintiff, Jane Doe*, attached hereto as: *Appellees' Motion I, Exhibit 5, B.*) Further,

the said jurat was made by a "Burton W. Newman" and a Burton W. Newman is an attorney of record for appellant in this case. (See: *Complaint, Answer* and affidavit jurat.)

7. That at the time of the filing of the aforesaid affidavit (*Appellees' Motion I, Exhibit No. 5, B*) the Appellees had no specific knowledge of, about, or concerning the allegations of the *Complaint* (formally denied by *Answer*) or of the affidavit of Jane Doe, and through the failure and refusal of the attorneys for Jane Doe to disclose the identity of Doe or other significant factual matters so as to permit ordinary discovery concerning her claims, and due to the *pendency* of the Appellees' motion to compel disclosure and permit discovery, Appellees were without lawful means to learn of the truth or falsity of any alleged facts represented to the Court of, about, or concerning Appellant, and were thus and thereby deprived, prohibited and foreclosed from receiving a fair hearing and just determination of the Appellant's motion for summary judgment which the Court did not rule upon and at this time has done no legal injury to Appellees.

8. Appellees, in opposition to Appellant's motion for summary judgment, timely filed with the District Court a memorandum of suggestions in opposition to such Appellant's motion, pointing out the existence of material factual issues and the unfairness and impossibility due to the aforesaid existing situation with regard to making any factual counter proof in opposition to the motion for summary judgment. (Copy of *Defendants' Memorandum in Opposition to Motion for Summary Judgment* attached hereto as: *Appellees' Motion I, Exhibit No. 6.*)

9. At the time of the filing of Appellant's motion for summary judgment, the affidavit thereto attached, taken in consideration of all the other pleadings and suggestions of the Appellant (e.g., see prayer for injunction of *Complaint*) had the reasonable and most probable effect of misleading the District Court as to material facts of the case, and did so mislead the Appellees, in that the reasonable and fair intendment of the affidavit (absent

other knowledge) was that the Appellant was at the date of October 5, 1973, pregnant, and that such pregnancy was then seriously complicated by other related bodily illnesses which required immediate medical attention, and that such purported factual matters were known to and asserted by the Appellant's attorneys of record in the case. Further, at such time (presumably unknown to the Court, and absolutely unknown to the Appellees) Appellant and Appellant's attorneys positively knew (if an admission of February 25, 1974, by Appellant's attorney is accorded credence) that Appellant was not pregnant in that an abortion had been committed on August 22, 1973, on her person and that she did not need or require and was incapable of utilizing the medical services of the City hospitals of the City of St. Louis and for the Court to so order and adjudge that the Appellees cause such medical services to be rendered to Appellant would be a physical impossibility and an objective legal nullity. Appellant's attorneys did nothing to correct or modify the aforesaid false understandings induced in the Court and Appellees as aforesaid.

10. Appellees, being, as aforesaid, totally deprived of and foreclosed from legal means for learning or discovering the truth, and in fact without such knowledge of any of the material facts of and concerning the Appellant and Appellant's allegations, did on February 22, *1974*, learn of statements attributed to Appellant's attorneys (or attorney) in the public news media to the effect that Appellant was not pregnant and had been aborted. As a consequence, Appellees did on February 25, 1974, file a *Motion to Dismiss Plaintiff's Complaint*. (Copy attached hereto as: *Appellees' Motion 1, Exhibit No. 7, A*), together with *Defendants' Suggestions on Question of Plaintiff's Standing to Sue* (copy attached hereto as: *Appellees' Motion 1, Exhibit No. 7, B*), which brought to the Court's notice the said media hearsay information, the then impossibility of Appellees to determine the truth or falsity of the information, and the resulting possibility of the mootness of the case and lack

of standing of the Appellant. Appellees moved the Court for an order requiring Appellant to disclose the truth of the Appellant's condition as to her alleged pregnancy and needs of critical medical attention.

11. On February 25, 1974, Appellant's attorneys directed a letter to His Honor, Roy W. Harper, Judge of the United States District Court presiding over the Division of the District Court in which this cause was then pending, which among other things, disclosed the abortion of Appellant on *August 22, 1973*. Thereafter, the Court sustained Appellees' motion and dismissed Appellant's case on March 22, 1974. (Copy of letter to Judge Harper's *Memorandum and Order* of March 22, 1974, with Exhibit 1 thereof, attached as *Appellees' Motion 1, Exhibit No. 8.*)

12. To the date of the filing of this motion Appellees have been and are presently foreclosed and without legal means unless relieved by this Court, from discovering the truth about the Appellant and Appellant's allegations contained in pleadings and other documents filed in the Courts of the United States and as a consequence have not had a fair trial or due process of law in connection therewith.

13. Rule 27, b, of the *Federal Rules of Civil Procedures*, does not appear to be adequate to protect the rights of Appellees under certain contingencies of decision by this Court, the basis for decision of the District Court, and the unruled upon motion of Appellees for discovery in the District Court.

Wherefore, Appellees respectfully pray that:

1. This Court enter an order limiting the issue on appeal to the question of the standing of the Appellant to sue in the District Court or the mootness of the case only; or

2. In denying the order in 1 (one) next above, to order the Appellant to disclose her identity and residence and submit to

discovery as is provided by the *Federal Rules of Civil Procedure*, according to such special rules as this Court may determine to be reasonable and just to both parties; and to fix times to permit such discovery by Appellees, and to enlarge the record on appeal to include the fruits of such discovery.

Respectfully submitted,

JACK L. KOEHR
City Counselor

EUGENE P. FREEMAN
Deputy City Counselor
Attorneys for Appellees-Defendants
314 City Hall
St. Louis, Missouri 63103

(Affidavit of service omitted in printing)

In the United States Court of Appeals
for the Eighth Circuit

(Title omitted in printing)

Appellant's Reply to Appellees' "Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law"

(Filed April 11, 1974)

On April 3, 1974 this Honorable Court, in recognition of the urgency and gravity of the issues inherent in this cause, issued an appropriate order accelerating the appellate procedure.

This brief Reply is filed in response to appellees' "Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law", heretofore filed on or about April 8, 1974.

Appellees' said "Motion" is a desperate attempt to delay further and to restrict unduly the appellate process and to foreclose any possibility of an appellate decision relating to the merits in said cause. Said "Motion" blatantly and unwarrantedly accuses appellant's counsel of "misleading the District Court" (para. 9), claims that appellees "have not had a fair trial or due process of law" (para. 12) and seeks to limit the options and jurisdiction of this Honorable Court during appeal.

Appellees have conveniently ignored the real issue at bar, *i.e.*, the unconstitutional policy of appellees, admitted to exist ("Defendants' Joint Answer", paras. 10 and 12) and admitted to be arbitrary in nature ("Answers to Interrogatories" of appellee Wochner, no. 3).

Appellees have also conveniently chosen to ignore the class action nature of the suit. At no time during the District Court proceedings did appellees serve interrogatories upon appellant, seek to take her deposition, nor file any counter-affidavits to "Plaintiff's Motion for Summary Judgment".

Appellees' "Motion" and the inappropriate relief therein sought do not enhance the appellate process nor further an equitable and judicious resolution of the issues at hand.

Wherefore, appellant respectfully prays that appellees' "Motion for Special Orders to Preserve, Guarantee and Effectuate Appellees' Rights to Fair Hearing and Due Process of Law" be overruled forthwith.

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER
& RIMMEL
7733 Forsyth Boulevard, Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Appellant

(Affiavit of service omitted in printing)

United States Court of Appeals
for the Eighth Circuit

No. 75-1648

Jane Doe, et al.,
Appellants,

v.

John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 11, 1975

Filed: January 5, 1976

Before Heaney, Webster and Henley, Circuit Judges.

Per Curiam.

On June 2, 1975 a panel of this court filed an amended opinion holding that the plaintiffs in this civil rights case, which was prosecuted as a class action, were entitled to declaratory and injunctive relief. In addition, the court determined that notwithstanding the holding of the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240 (1975), plaintiffs were entitled to an award of an attorney's fee against the defendant, John H. Poelker, Mayor of the City of St. Louis, Missouri. This court fixed a fee of $3500.00 as compensation for the services of plaintiffs' counsel at the appellate level, and

remanded the case to the district court with directions to fix a fee for the services of counsel in that court. *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975).[1]

With specific regard to the attorney's fee to be awarded the court said (515 F.2d at 548):

> . . . On remand the district court is directed to determine attorneys' fees and to award them to Doe, together with court costs, against the defendant Poelker for that portion of the case carried on in that court. This should be a fair award based on the guidelines listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974).[2]

Pursuant to the mandate of this court, the district court held an evidentiary hearing. It found that $9317.50 would be a reasonable fee for the district court services of plaintiffs' counsel, but on the basis of a statement appearing in the opinion in the *Johnson* case, *supra*, the district court concluded that no fee should be allowed since the plaintiffs were not contractually obligated to pay any fee, fixed or contingent, to their attorney. An order denying plaintiffs' application for a fee was entered. Plaintiffs appeal.

Johnson was an individual and class action brought ultimately by two Negroes under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; they claimed racial discrimination in employment and sought back pay and injunctive relief. The defendant initially objected to the maintenance of the action as a class suit and also demanded a jury trial on the legal issues pre-

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[1] *See also Doe v. Poelker*, 497 F.2d 1063 (8th Cir. 1974).

[2] Senior Circuit Judge Van Oosterhout, a member of the panel, dissented from so much of the holding as allowed an attorney's fee at either the appellate or the district court level without a prior find- of bad faith by the district court.

sented by the complaint. The district court upheld the defendant on both points. *Johnson v. Georgia Highway Express, Inc.*, 47 F.R.D. 327 (N.D. Ga. 1968). The Court of Appeals for the Fifth Circuit reversed. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). Thereafter, the case was tried on the merits, and the plaintiffs prevailed. They were represented throughout by practicing Georgia lawyers, some of whom at least were connected with the NAACP, and by a New York lawyer also associated with the organization just mentioned. The district court allowed the plaintiffs a substantial attorneys' fee which plaintiffs deemed insufficient, and they appealed.

The Court of appeals was of the opinion that the district court had not spelled out with sufficient clarity the factors which it took into consideration in fixing the fee and remanded the case for reconsideration in the light of twelve specific factors which the appellate court mentioned.

One of those factors was whether counsel were representing the plaintiffs on a contingent rather than a fixed fee basis if, in fact, the parties had made any agreement as to a fee. After quoting from *Clark v. American Marine Corp.*, 320 F.Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971), the court said (488 F.2d at 718):

> . . . In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount.

On the basis of that language the district court reasoned in the instant case that the obligation of a losing defendant to pay a judicially imposed attorney's fee to a successful plaintiff does not exceed in amount the fee that the plaintiff would be obligated contractually to pay to his lawyer in the absence of any judicial award, and that where the plaintiff's contractual obligation to his lawyer is zero, the defendant's obligation with respect to the court imposed fee is also zero.

We do not think that the language from *Johnson*, quoted above, when read in context and in connection with the opinion of the district court in *Clark v. American Marine Corp., supra*, is fairly susceptible to the construction that the court below evidently placed upon it.

The district court wisely entered his evidentiary findings with respect to a reasonable fee notwithstanding his conclusion that such fees could not be awarded. We accept the district court's determination that in the light of the *Johnson* factors the sum of $9317.50 would be a reasonable fee for the services of plaintiff's counsel in the district court, and we remand the case with directions to the district court to enter an order awarding that amount against the defendant Poelker.

Counsel for plaintiffs asks that we award an additional fee for his services in connection with this appeal. We decline to do so.

Reversed and remanded.

A true copy.

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, Eighth Circuit